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Before the
Federal Communications Commission
Washington, D.C. 20554

WT 02-196

In the Matter of:	)	Application File Nos.
	)	0000400857, 0000401688, 0000402494,
Applications of i2way Corporation	)	0000478587, 0000478906, 0000507349,
	)	0000507386, 0000507461, 0000507464,
	)	0000509129, 0000509131, 0000509132,
	)	0000509136, 0000515072, 0000519117,
	)	0000527643, 0000608155, 0000609619,
	)	0000609643, 0000612412, 0000612425,
	)	0000617751, 0000617758, 0000622894,
	)	0000622895, 0000622917

To: Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

REQUEST FOR DECLARATORY RULING

Submitted on behalf of:
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SUMMARY

In this Request for Declaratory Ruling, i2way Corporation seeks an interpretative ruling regarding the intent and meaning of the 10-channel limit set forth in Section 90.187(e) of the Commission's rules. This rule has been used as the basis for FCC return and/or dismissal of various i2way applications filed to obtain ten frequency pairs in the 150 MHz and 450 MHz frequency bands at discrete sites in metropolitan areas. The relevant FCC return notices suggest that Section 90.187(e) prohibits simultaneous 10-channel applications by the same applicant for different sites in the same area.

The interpretation being given to Section 90.187(e) is at odds with the text of the rule. The rule states only that "[n]o more than 10 channels for trunked operation in the Industrial/Business pool may be applied for in a single application." In view of the history of the rule and relevant appellate court decisions, i2way Corporation believes that Section 90.187(e) is being misconstrued. Applicant i2way Corporation therefore requests a declaratory ruling to clarify the permissible scope and intent of the rule.

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To: Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

Request for Declaratory Ruling

The above-identified applicant, i2way Corporation ("i2way"), by its attorneys, hereby requests that the Federal Communications Commission ("FCC" or "Commission") issue a declaratory ruling pursuant to Section 1.2 of the Commission's rules and regulations, 47 C.F.R. §1.2, addressing the intent and meaning of Section 90.187(e), 47 C.F.R. §90.187(e).[2] This request for declaratory ruling is being filed specifically to seek clarification regarding whether the ten-channel limit contained in Section 90.187(e) of the Commission's rules compels the return or dismissal of applications in situations where a single applicant has filed multiple applications,

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[1] The application file numbers associated with this request reflect i2way Corporation's best efforts to identify all of the applications that the Federal Communications Commission has found may be in violation of the Commission's interpretation of the 10-channel limit set forth in Section 90.187(e). If this list is later determined to be incomplete or inaccurate, i2way will promptly submit a corrected list to the Commission.

[2] Section 1.2 of the FCC's Rules and Regulations provides that "[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."

each requesting 10 channels, for different sites within the same general service area.[3]

Introduction

The applicant, i2way, intends to deploy a highly efficient, dynamic, digital-based system for assigning frequency pairs to be used by two-way customers. When i2way's system is fully deployed, it will provide effective two-way communications in virtually all major urban areas of the country. To accommodate the deployment of its state-of-the-art digital system, i2way requires a complement of various types of radio facilities within the same metropolitan area and, for this reason, has filed multiple applications for the same areas in many parts of the country. Many of these applications were returned or dismissed by the Commission for a perceived violation of the 10-channel limit specified in Section 90.187(e).

Some of the applications filed by i2way seek access to frequencies in 450-470 MHz band. Others seek access to frequencies in 150-174 MHz band. Some applications propose to use low-power applications in the 450-460 MHz range. Others propose to implement full-power stations. Some applications seek FB8 trunked operations. Others specify FB6 mode. Each type of application was specifically designed to fulfill a specialized role in i2way's overall system design. While the technical parameters specified for the proposed stations vary from application to application, the returned or dismissed applications generally had one characteristic in common: they requested a maximum of 10 channels.

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[3] Section 90.187(e) states, in pertinent part, "[n]o more than 10 channels for trunked operation in the Industrial/Business pool may be applied for in a single application."

FCC Return Notice

While the particular circumstances that gave rise to the application returns or dismissals varied from one application to another, the basis for the Commission's adverse decision was, in each case, the 10-channel limit set forth in Section 90.187(e). More specifically, the Commission returned or dismissed the applications because, at the time of filing, i2way had either: (1) a licensed but unconstructed 10-channel station at a different site in the same service area as proposed in the application; or (2) another 10-channel application pending at the Commission to use different frequencies at a different site in the same service area as proposed in the returned or dismissed application.

The stated reason underlying return or dismissal was that the subject applications lacked certification attesting that

> '. . . all . . . existing channels authorized for trunked operation have been constructed and placed in operation.' Such certification is required by Rule 90.187. Specifically, stations that have already been granted in this area must be constructed before this application may be processed. Also, there is more than one pending application for trunked operations in this area. Multiple applications for trunked operations are not permitted since you can not certify that the application that will be granted is constructed.[4]

Return of Applications Requesting Frequencies in the 150-174 MHz Band

In the case of some applications for the 150-174 MHz band, the application returns or dismissals appear to have been due to a mis-reading of the applications themselves. In those applications, i2way specified the ten frequencies to be used for mobile relay transmissions as

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[4] This text is extracted from an FCC return notice for a representative i2way application.

well as ten frequencies to be used as mobile transmit (input) frequencies to the mobile relay station. This is consistent with the customary approach for the 150-174 MHz band. Since the rules do not specify a standard pairing of mobile/mobile relay frequencies, the applications customarily identify the set of ten base station transmit frequencies and another set of ten mobile transmit frequencies. The applications also requested "talk-around" capability for the mobile units. When identifying the frequencies for which "talk-around" was requested, the applications listed a redundant set of ten frequencies.

Several of the applications for 150-174 MHz were returned or dismissed solely because the applications were construed as requesting thirty (30) discrete channels. For these applications, the base station transmit frequencies were apparently viewed as ten discrete channels and the set of ten mobile transmit frequencies was considered to be ten additional channels. The recitation of ten "mobile-talk" around channels was apparently also viewed as constituting a third set of ten channels. Thus, there was a perceived violation of the ten-channel per application limit, when in fact the applications were requesting ten frequency pairs in the aggregate.

Need for Declaratory Ruling

The Commission's decision to return or dismiss i2way's application is not supported by rule. Section 90.187(e) specifies that "[n]o more than 10 channels for trunked operation in the Industrial/Business Pool may be applied for *in a single application.*" [Emphasis added.] The applications complied with that specific requirement: The applications were limited to ten channels.

To the extent that the Commission may be reading additional requirements into Section 90.187(e), such as the restriction that an applicant may not simultaneously file two different ten-

channel applications for sites in the same geographic area, those additional requirements are unsupported by rule and are contrary to fundamental principles of administrative law. Accordingly, i2way Corporation is compelled to request a declaratory ruling as to the meaning and intent of Section 90.187(e).

Examination of Section 90.187(e)

A. Background of the Ten-Channel Limit

The Commission introduced the ten-channel limit by means of rules adopted in June 1999 in the *Third Memorandum Opinion and Order* in the land mobile "refarming" proceeding, PR Docket No. 92-235.[5] Prior to adoption of the *Third Memorandum Opinion and Order*, the rules imposed no limit on the number of 450 MHz and 150 MHz channels for which applicants could apply. The ten-channel limit was adopted to preclude applicants from "warehousing" spectrum. Specifically, the Commission noted that certain commenters had proposed a limit on the number of channels requested in a single application "lest an applicant inhibit effective use of the spectrum by obtaining authorizations for trunked channels that would not be immediately used."[6] The Commission agreed that the concerns of these commenters were valid and so was "persuaded that a limit is appropriate."[7]

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[5] In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Third Memorandum Opinion and Order* (FCC 99-138), PR Docket No. 92-235, adopted June 10, 1999, released July 1, 1999, 14 FCC Rcd. 10922 (1999).

[6] *Third Memorandum Opinion and Order*, PR Docket No. 92-235, 14 FCC Rcd. at 10930.

[7] *Id.*

B. Intent of the Ten-Channel Limit

The clear intent of the ten-channel limit included in Section 90.187(e) is, as the Commission itself stated, to prevent the "warehousing"of spectrum. The Commission left no doubt that it opposes warehousing for two primary reasons. *First*, warehousing "inhibits effective use of the spectrum." *Second*, warehousing allows licensees to accumulate "trunked channels that would not be immediately used."[8]

Legal Analysis

A. The Commission Did Not Expressly Intend for the Ten-Channel Limit To Apply to Shared Spectrum.

In 1999, when Section 90.187(e) was adopted, the only mode of trunking recognized in the rules for the 150 MHz and 450 MHz bands was centralized trunking conducted on spectrum that was either licensed exclusively to a single entity or centralized trunking conducted with the concurrence of co-channel licensees. Not until the year 2000 did the Commission incorporate into its rules the concept of decentralized trunking on shared spectrum.[9] Thus, at the time Section 90.187(e) was adopted, the Commission had no intent or inkling that the ten-channel limit might apply to decentralized trunked systems operating on shared spectrum.[10] Indeed, it would be counter-intuitive

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[8] *Id.*

[9] *See* Section 90.187(b), adopted in *Report and Order and Further Notice of Proposed Rule Making* (FCC 00-235), WT Docket No. 98-182, released July 12, 2000, 65 Fed. Reg. 60869 (10/13/2000).

[10] Moreover, the Commission had previously stated in the refarming proceeding, "[w]e conclude, therefore, that Section 90.187 applies only to centralized trunked systems." *Notice of Proposed Rulemaking*, WT Docket No. 98-182 and PR Docket No. 92-235, released October 20, 1998, ¶23.

to apply the ten-channel limit in Section 90.187(e) to shared spectrum because, in an environment where the spectrum is shared, a licensee is powerless to "warehouse" the assigned spectrum. By definition, licensees on shared spectrum have no ability to "inhibit effective use of the spectrum."

B. The Attempt to Preclude Multiple Applications for Different Sites Within The Same Geographic Area Violates Fundamental Principles of Rule Making Applicable to Federal Administrative Agencies.

Congress has made it abundantly clear that the FCC, as well as other Federal agencies, must provide the public with clear notice—in advance—of the rules that it intends to adopt. This requirement is set forth in the Administrative Procedure Act (APA). The APA directs Federal agencies to publish notice of an anticipated rule and allow an opportunity for public comment before the rule is formally adopted. It is violative of the Administrative Procedure Act for the Commission—without following public notice and comment procedures—to convert a rule that states "[n]o more than 10 channels . . . may be applied for in a single application" into a rule prohibiting multiple applications over the vast expanse of a metropolitan area. Before the Commission seeks to implement a substantive rule prohibiting the filing of multiple applications within a metropolitan area, it must announce in advance, through appropriate notice and comment, how it intends to define the service area. The Supreme Court expects nothing less: "There is no warrant in law for [an agency] to replace the statutory scheme with a rule-making procedure of its own invention."[11]

C. The Commission Has Not Provided "Clear Notice" of the Standard Being Used As the Basis for Dismissal.

If the Commission is permitted to expand the meaning of Section 90.187(e) beyond its logical

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[11] *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

limits, the result will be the dismissal of all i2way Corporation applications in every geographic market except for the one ten-channel application per area that i2way Corporation would be allowed to retain in pending status. In such situations, the courts have made it abundantly clear that the FCC must clearly articulate the standard used as the basis for dismissal. Specifically, the Court of Appeals for the District of Columbia Circuit has held that dismissal of an application pending before the Commission is sufficiently grave as to require the agency to provide clear notice of its rules.[12] In the instant situation, the "gloss" that the Commission has applied to Section 90.187(e) fails to meet that judicial test.

D. The Attempt to Preclude Multiple Applications for Different Sites Within The Same Geographic Area Is Contrary to Other Judicial Pronouncements.

The Court of Appeals for the D.C. Circuit has made it equally clear that the FCC may not deviate beyond the rational boundaries of its own rules. "It is elementary," the Court declared, "that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned. Simply stated, rules are rules, and fidelity to the rules is required."[13] In its attempt to dismiss the i2way applications, the FCC is not being faithful to the dictates of Section 90.187(e).

E. The Decision to Limit i2way Corporation to Ten Channels Per Market Will Prevent i2way From Competing Effectively With Other Service Providers.

The requested channels will promote competition in the Commercial Mobile Radio Service

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[12] *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1 (D.C. 1987).

[13] *Reuters Limited v. FCC*, 781 F.2d 946, 955 (D.C. Cir. 1986).

by aiding i2way's build-out of its nationwide digital network. The applicant seeks to provide a viable, cost-effective two-way land mobile service using spectrum-efficient 12.5 kHz and 6.25 kHz technology. The competition that i2way Corporation is facing includes cellular companies which, by virtue of FCC action taken on November 8, 2001, enjoy access to 55 megahertz of spectrum in each market.

With respect to the issue of the commercial wireless spectrum cap, the Department of Commerce directed the FCC to move forward on "complete and immediate repeal of [commercial mobile radio services] spectrum aggregation and cellular cross-interest rules." In doing so, Secretary of Commerce Donald Evans explained that "[t]oday's cap is arbitrary and outdated. Technology must be free to advance as fast as the market demands."[14] For the same reasons, applicant i2way requires as much flexibility, and spectrum, as possible to implement a system than can provide advanced digital communications for its dispatch customer base.

If i2way Corporation is to be limited to ten channels (125 kilohertz) in each market during a single round of applications, it will be denied the spectrum necessary to make its proposed operations successful. There will be insufficient channels to permit i2way Corporation to gain a foothold in the markets that it proposes to serve. Equally important, there will be insufficient channels to induce the nation's financial community to commit investment funds to the proposed system. The same public policy that has motivated efforts by the Bush Administration to eliminate the spectrum cap for cellular systems compels the Commission to at least adhere to an objective and

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[14] *Bush Signals to Lift Cap*, RCR WIRELESS NEWS, October 29, 2001, pages 1,6. (On November 8, 2001, the Commission voted 3-1 to raise the spectrum cap to 55 megahertz for 13 months and to completely eliminate the cap on January 1, 2003.)

accurate reading of Section 90.187(e).

Conclusion

For the reasons stated above, i2way Corporation believes that there is a pressing need for the Commission to examine Section 90.187(e) and issue a declaratory ruling as to the intent, meaning and application of the rule. The current FCC interpretation of Section 90.187(e) is contrary to the actual words and content of the rule. If the Commission's interpretation is allowed to stand, extreme hardship will be visited upon i2way Corporation, and vast sums of money expended in reliance on the rules will be wasted. Moreover, the adverse effect on the public will be incalculable. The "gloss" being applied to Section 90.187(e) will cause the demise of a radio system that has the potential to offer a state-of-the-art, low-cost nationwide dispatch service premised on efficient use of 6.25 kHz and 12.5 kHz channels. Consistent with the intent of Section 1.2 of the Commission's rules, the current ambiguity requires a Commission ruling to resolve the controversy, remove the uncertainty and allow i2way Corporation to develop a viable two-way land mobile system.

Respectfully submitted,

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